Kind Action (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01(A)-70–02 OF 2022
VAZEER ALAM, GUNALAN MUNIANDY AND HASHIM HAMZAH JJCA
13 AUGUST 2024

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Civil Procedure — Judicial review ('JR') — Application — Whether party was precluded from applying for JR if it had not exhausted statutorily-provided remedy of appeal — Appellant filed JR application against Revenue's decision that it pay income tax on gains it made from sale of lands — Appellant simultaneously lodged appeal against Revenue's decision under s 99(1) of Income Tax Act 1967 — Whether court was precluded from hearing JR application as appeal process had not been exhausted — Whether decision requiring appellant to pay business income tax on gains from land sale was illegal and against principle of double taxation as appellant had fully paid real property gains tax in respect of those gains — Whether clear-cut case of illegality should be nipped in bud quicker by way of JR than by insisting that appeal process should take its course

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The appellant had disposed of certain lands in respect of which it had paid real property gains tax levied by the respondent under the Real Property Gains Tax Act 1976 ('RPGTA'). Subsequently, the respondent took the position that the gains made by the appellant from the land sale were also subject to business income tax under s 4(1) of the Income Tax Act 1967 ('the ITA') and issued notices to the appellant to pay that additional tax. Although the appellant lodged an appeal against the decision under s 99(1) of the ITA, it also challenged the decision by way of a judicial review application. The High Court dismissed the JR application after holding that: (a) the issues raised by the appellant were mainly fact-centric and therefore should appropriately be determined by the Special Commissioners of Income Tax on appeal rather than by way of judicial review; and (b) the respondent was not resorting to double taxation as it was entitled under the law to require payment of business income tax on the gains from the disposal of the lands after taking into account the real property gains tax that had been paid.

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Held, unanimously allowing the appeal, setting aside the High Court's decision and allowing the JR application:

(1) The existence of the s 99(1) remedy under the ITA did not bar the appellant's application for judicial review. Nowhere in O 53 of the Rules

of Court 2012 was it stated that the existence of a domestic remedy would bar a judicial review application (see paras 20–21).

(2) Judicial review was always at the discretion of the courts. No acid test was applicable in judicial review applications (be it exceptional circumstances, error of law or abuse of power). If a good case was brought before the court for review, for instance if there was clear illegality on the part of the decision-making authority, then in the interest of justice, such application should be allowed. In the instant case, the respondent's conduct in issuing the additional notices for payment of income tax was tainted with illegality. By failing or omitting to discharge or revoke the RPGTA certificate of assessments and clearance issued to the appellant, in effect it resulted in double taxation for the same land transactions but under two different legislations. This was clearly an illegality (see paras 25–26 & 28).

(3) The respondent did not dispute that the initial assessment under the RPGTA was not discharged. As the law stood, the correct procedure was for the respondent to revise and discharge the assessment under the RPGTA before raising the taxes under the ITA. Since the respondent did not do that, its raising of the fresh assessment under the ITA was clearly illegal and ran contrary to the principle against double taxation. As the respondent had already issued the RPGTA assessment and certificate of clearance with respect to the land transactions, it was bound by the same and should not be allowed to act inconsistently or arbitrarily or to blow hot and cold. The High Court judge erred in failing to appreciate that the respondent had failed to act in accordance with the law or had arguably acted ultra vires (see paras 35–36, 38–39 & 42).

(4) The High Court judge also erred in law in holding that the SCIT was the proper forum under the ITA to deal with the merits of this case and that the appellant was precluded from pursuing the JR application due to the existence of the domestic remedy in the ITA. Yet, in the same breath, the judge took a completely contradictory approach and determined that the judicial review application had no merit and should be dismissed. The judge's decision was clearly erroneous and warranted appellate intervention (see paras 46–48 & 50).

[Bahasa Malaysia summary

Perayu telah melupuskan tanah tertentu yang mana ia telah membayar cukai keuntungan harta tanah yang dikenakan oleh responden di bawah Akta Cukai Keuntungan Harta Tanah 1976 ('ACKHT'). Seterusnya, responden mengambil pendirian bahawa keuntungan yang diperoleh perayu daripada penjualan tanah juga tertakluk kepada cukai pendapatan perniagaan di bawah s 4(1) Akta Cukai Pendapatan 1967 ('ACP') dan mengeluarkan notis kepada

perayu untuk membayar cukai tambahan itu. Walaupun perayu membuat rayuan terhadap keputusan di bawah s 99(1) ACP, ia juga mencabar keputusan itu melalui permohonan semakan kehakiman. Mahkamah Tinggi menolak permohonan JR selepas memutuskan bahawa: (a) isu yang dibangkitkan oleh perayu adalah terutamanya berpaksikan fakta dan oleh itu sewajarnya harus ditentukan oleh Pesuruhjaya Khas Cukai Pendapatan semasa rayuan dan bukannya melalui semakan kehakiman; and (b) responden tidak mengenakan cukai berganda kerana ia berhak di bawah undang-undang untuk menghendaki pembayaran cukai pendapatan perniagaan ke atas keuntungan daripada pelupusan tanah selepas mengambil kira cukai keuntungan harta tanah yang telah dibayar.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membenarkan permohonan JR:

(1) Kewujudan remedi s 99(1) di bawah ACP tidak menghalang permohonan perayu untuk semakan kehakiman. Tiada mana-mana dalam A 53 Kaedah-Kaedah Mahkamah 2012 menyatakan bahawa kewujudan remedi domestik akan menghalang permohonan semakan kehakiman (lihat perenggan 20–21).

(2) Semakan kehakiman sentiasa mengikut budi bicara mahkamah. Tiada ujian asid digunakan dalam permohonan semakan kehakiman (sama ada keadaan luar biasa, kekhilfan undang-undang atau salah guna kuasa). Jika kes yang baik dibawa ke mahkamah untuk semakan, contohnya jika terdapat ketidaksahan yang jelas di pihak berkuasa pembuat keputusan, maka demi kepentingan keadilan, permohonan tersebut harus dibenarkan. Dalam kes semasa, kelakuan responden dalam mengeluarkan notis tambahan untuk pembayaran cukai pendapatan telah dicemari dengan penyalahan undang-undang. Dengan gagal atau tidak melepaskan atau membatalkan sijil taksiran ACKHT dan pelepasan yang dikeluarkan kepada perayu, sebenarnya ia mengakibatkan cukai berganda bagi urus niaga tanah yang sama tetapi di bawah dua perundangan yang berbeza. Ini jelas satu ketidaksahan(lihat perenggan 25–26 & 28).

(3) Responden tidak mempertikaikan bahawa taksiran awal di bawah ACKHT tidak dilepaskan. Mengikut undang-undang, prosedur yang betul adalah untuk responden menyemak dan melepaskan taksiran di bawah ACKHT sebelum menaikkan cukai di bawah ACP. Oleh kerana responden tidak berbuat demikian, kenaikan taksiran baharu di bawah ACP adalah jelas menyalahi undang-undang dan bertentangan dengan prinsip terhadap cukai berganda. Memandangkan responden telah pun mengeluarkan taksiran ACKHT dan sijil pelepasan berkenaan dengan urus niaga tanah, ia terikat dengan perkara yang sama dan tidak boleh dibenarkan bertindak secara tidak konsisten atau sewenang-wenangnya

atau bertindak tidak konsisten. Hakim Mahkamah Tinggi terkhilaf kerana gagal memahami bahawa responden telah gagal bertindak mengikut undang-undang atau boleh dikatakan bertindak ultra vires (lihat perenggan 35–36, 38–39 & 42).

(4) Hakim Mahkamah Tinggi juga terkhilaf dari segi undang-undang dalam memutuskan bahawa SCIT adalah forum yang sesuai di bawah ACP untuk menangani merit kes ini dan bahawa perayu telah dihalang daripada meneruskan permohonan JR kerana wujudnya remedi domestic dalam ITA. Namun, dalam keadaan yang sama, hakim mengambil pendekatan yang bercanggah sama sekali dan memutuskan bahawa permohonan semakan kehakiman tidak mempunyai merit dan harus ditolak. Keputusan hakim jelas salah dan memerlukan campur tangan rayuan (lihat perenggan 46–48 & 50).]

Cases referred to

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185, SC (refd)
Kind Action (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2021] MLJU 637
Lai Cheng Cheong v Sowaratnam [1983] 2 MLJ 113, FC (refd)
MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2005] 7 MLJ 260, HC (folld)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
S Singaram v Fong Peck Moi & Anor [1976] 1 MLJ 237 (folld)
Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 4 MLJ 685, CA (distd)

Legislation referred to

Income Tax Act 1967 ss 4, 4(a), 91, 99, 99(1)
Real Property Gains Tax Act 19761976 s 20
Rules of Court 2012 O 53

Appeal from: *Kind Action (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2021] MLJU 637 (High Court, Johor Bahru)

Anand Raj (with Foong Pui Chi, Cheong Wen Yie and Thivagar Paramasivam) (Shearn Delamore & Co) for the appellant.
Ashrina Ramzan Ali (with Surani bt Che Ismail) (Senior Revenue Counsel, Inland Revenue Board Malaysia) for the respondent.

Hashim Hamzah JCA:

INTRODUCTION

[1] This is the appellant's appeal against the decision of the learned judicial commissioner ('JC'), who had dismissed the appellant's application for judicial review against the decision of the respondent.

BACKGROUND FACTS

[2] Briefly, the facts leading to the present appeal are as follows.

[3] The appellant, as part of the Synthomer Group, acquired three plots of land ('the land') from its immediate parent company, Revertex Malaysia Sdn Bhd ('RMSB'), in a transfer that was part of the group's strategy. This transfer was executed through a sale and purchase agreement dated 24 May 2004 ('the SPA').

[4] The appellant subsequently subdivided the land into smaller lots ('the lots') and disposed of them between 2007 and 2017 at the total price of RM338,037,337.33. For the disposal of the lots, the appellant paid taxes under the Real Property Gains Tax Act 1976 ('the RPGTA 1976') and was issued a certificate of clearance.

[5] However, in the course of a tax investigation which began in 2019, the respondent adopted the position that the proceeds arising from the disposal of the lots were subject to additional income tax under s 4 of the Income Tax Act 1967 ('the ITA 1967') as a business income on the basis that the appellant's activities of realising its investments were through the nature of trade.

[6] The appellant, after having been notified by the respondents of the audit findings, responded by disagreeing with the respondent's decision. The respondent rejected the appellant's explanation and justification and proceeded to issue the Notices of Additional Assessment for years of assessment ('Y/A') 2010, 2015 and 2018 dated 3 December 2020 ('disputed notices').

[7] The appellant then filed a judicial review application against the decision of the respondent before the High Court. After hearing both parties, the learned JC dismissed the appellant's application for judicial review. Aggrieved with the decision of the learned JC, the appellant filed this appeal.

FINDINGS OF THE LEARNED JC

[8] The learned JC was of the view that there was no merit in the appellant's application for judicial review against the respondent based on the following findings.

[9] Firstly, the learned JC agreed with the respondent that the disputed notices for Y/A prior to 2015 were not statutorily time-barred and found that it was the appellant who had negligently (though not fraudulently) failed to furnish the proper information and to make the proper declaration. The learned JC was of the opinion that the plea of limitation should be raised before the SCIT.

[10] Secondly, the learned JC found that the respondent was not bound by the RPGTA 1976 assessments and certificate of clearance as s 91 of the ITA 1967 vested the power in the respondent to impose additional income tax.

[11] Thirdly, the learned JC found that the issue of double taxation did not arise as the respondent had made the necessary adjustments by considering the payment under RPGTA 1976 made by the appellant in the additional assessments and imposition of the penalty under the ITA 1967. The learned JC also found that there was nothing sinister or bad faith on the part of the respondent's action in issuing the additional notice of assessment, as the respondent was empowered to do so under the ITA 1967.

[12] Having found that the respondent had acted within the powers conferred by the ITA 1967 and the RPGTA 1976, in the court's view, the respondent had not acted in bad faith or breached any rules of natural justice.

[13] In a nutshell, the learned JC was of the view that all the issues and contentions raised by the appellant were related to findings of fact that warranted the Special Commissioners of Income Tax ('SCIT') to be the proper forum for resolution.

ISSUES

[14] The appellant raised a total of 48 grounds of appeal through its additional memorandum of appeal. However, with respect to the learned JC and the respondent for this appeal, we are inclined to uphold the contentions of the appellant on the determinant contentious issues as follows.

OUR FINDINGS

[15] Before us, the pith of the respondent's argument was that this was not a proper case for the appellant to bypass the avenue to appeal to the SCIT pursuant to s 99 of the ITA 1967.

[16] For the sake of completeness, s 99(1) of the ITA 1967 reads:

> Section 99 Right of appeal.
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> (1) Subject to subsection (1A), *a person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment for which the assessment was made* (or within such extended period as regards those days or months as may be allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form. (Emphasis added.)

[17] It was undisputed in the present case that the appellant had indeed filed an appeal to the SCIT against the additional assessments and, at the same time, filed a judicial review application against the decision of the respondent.

[18] The respondent submitted that since the appellant had disputed the notices of assessment, the issue of whether the gains from the disposal of lands should be subjected to the ITA 1967 would require embarking on a fact-finding exercise pertaining to the activities carried out by the appellant, the dynamics of the relationship between the appellant, RMSB and the Synthomer Group, the appellant's accounting process, activities carried out on the lots, whether the badges of trade indicated that the transactions were trade activities or investments, and what was the overall intention of the transactions. Since intention can only be gleaned from the circumstances of the case, it was palpable that the facts of the case need to be scrutinised.

[19] Overall, we disagree with the respondent for the following reasons.

[20] Firstly, we hold that the existence of a domestic remedy under the ITA 1967 does not bar the appellant's application for judicial review.

[21] There is nowhere stated in O 53 of the Rules of Court 2012 ('the ROC 2012') that the existence of a domestic remedy will bar an application for judicial review. The courts have long acknowledged, based on the landmark Supreme Court and Federal Court decisions, that the availability of alternative

internal remedies in the form of an appeal process does not bar any application for judicial review.

[22] In *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, the Supreme Court through Hashim Yeop A Sani SCJ (as he then was) held as follows:

> A clear principle is reiterated here ie *it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.* (Emphasis added.)

[23] Edgar Joseph FCJ (as he then was) speaking for the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 stated:

> The reason for this is that whilst in theory the courts there frequently recite the incantation that alternative remedies must be exhausted before recourse may be had to judicial review, *in practice, the courts are often much kinder to the applicant with a good case on the merits*, who is faced with this hurdle to clear and will most probably entertain his application as an exception ...
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> *... Speaking generally, it is right to say that if an applicant in judicial review proceedings can demonstrate illegality, that is to say, unlawful treatment, it would be wrong to insist that he exhausts his statutory right of appeal where one is available. Why should illegal action not be nipped in the bud by the quicker, more convenient and adequate remedy of Judicial Review rather appeal?* It is, of course, true that convenience in this context means convenience not only for the parties but also in the public interest (*R v Huntingdon District Council; ex p Cowan &Anor* [1984] 1 WLR 501 *(a licensing appeal) ...*
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> *... Having said that we recognize that there are certain classes of cases such as planning, employment cases and tax cases (see, eg R v Commissioner for the Special Purposes of the Income Tax Acts; ex p Napier* [1988] 3 All ER 166*; R v Epping Forest DC; ex p 'Green* [1993] 1 COD 81) *where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review but this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess or abuse of power, or breach of the rules of natural justice (see Accountant in bankruptcy v Alls of Gillock* [1991] SLT 765 *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708). (Emphasis added.)

[24] On a similar tone, Wan Suleiman FCJ (as he then was) speaking for the Federal Court in *Lai Cheng Cheong v Sowaratnam* [1983] 2 MLJ 113 held as follows:

> *The existence of alternative remedies have negligible effect on restricting the powers of the courts to provide relief.* At p 425 of the same edition appears the following passage, under the heading 'Effect of Alternative Remedies':

> The existence of a right of appeal to the courts from a tribunal's decision does not deprive the courts of power to award prohibition to restrain the tribunal from acting outside its jurisdiction. *Nor is the applicant obliged to have exhausted prescribed administrative means of redress before having recourse to the courts.*
>
> *An applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy* — see *R v Postmaster General Ex p Carmichael* [1928] 1 KB 291. (Emphasis added.)

[25] Based on the above, it is axiomatic that judicial review is always at the discretion of the courts. We take it to be the law that no acid test is applicable in judicial review applications (be it exceptional circumstances, error of law, or abuse of power). Still, if a good case is brought before the court for review, for instance, if there is clear illegality on the part of the decision-making authority, then in the interest of justice, such application should be allowed.

[26] Back to the facts in the present case, we found that the decision or conduct of the respondent in issuing the disputed notices was tainted with illegality.

[27] It was not disputed that the respondent had already issued the RPGTA 1976 assessment and certificate of clearance to the appellant in respect of the land transactions pertaining to the lots. Nevertheless, the respondent proceeded to issue additional assessments through the issuance of the disputed notices under the ITA 1967 in respect of the very same transactions.

[28] In doing so, the respondent has failed or omitted to discharge or revoke the RPGTA certificate of assessments and clearance. In effect, it resulted in double taxation for the same land transactions but under two different legislations. This is clearly an illegality.

[29] In *Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 4 MLJ 685, the applicant was assessed to real property gains tax under the RPGTA 1976 on the gain made arising from the disposal of the property, and a certificate of clearance was issued after the sum assessed was paid. Subsequently, the Revenue took the position that the gains from the sales by the applicant should be subjected to income tax under s 4(a) of the ITA 1976. Therefore, an amended assessment was issued.

[30] On this issue, Zaleha Zahari JCA (as she then was) stated as follows:

> [20] On the issue of double taxation, we agree that the position in Malaysia is different from that in England. *The ITA applies only to income, whilst the RPGT applies only to capital gains on real property. It has to be either one or the other, it cannot be both.* Unlike in England, *the question of subjecting a taxpayer to both taxes in respect*

of the same receipt cannot arise here. The authorities cited by the appellant on this issue are clearly distinguishable. (Emphasis added.)

[31] The respondent, on the other hand, also relied on the same case in contending that there is no rule of law precluding the respondent from discharging the assessment under the RPGTA 1976 and proceeding with an assessment under the ITA 1967.

[32] The following passage of Zaleha Zahari JCA's (as she then was) judgment was quoted from *Teruntum Theatre*'s case:

> [19] We therefore agree with the conclusion that *there is no rule of law precluding Revenue from discharging the assessment under the RPGT and proceeding with an assessment under the ITA. That Revenue is, if the facts and circumstances warrant it, free to revise and discharge the assessment under the RPGT and to then raise an assessment under the ITA.*

[33] However, the facts in *Teruntum Theatre*'s case can be distinguished from the facts in the present case. In *Teruntum Theatre*'s case, there was evidence to show that the Revenue had notified the applicant that the real property gain tax would be transferred to the applicant's account. The gain made by the applicant arising from the sales was then assessed to income tax under s 4(a) of ITA 1967, and the real property gains tax paid was transferred to the applicant's account.

[34] The following can be observed:

> [21] *We agree that the appellant has not been subjected for double taxation in this case.* The appellant is not subjected to two different charges in respect of the same receipt *as it has not been charged for both real property gains tax under the RPGT and income tax under the ITA. The evidence shows that Revenue*, upon taking the position that the gains arising from the sales was to be the subject of income tax, *notified the appellant that the real property gains tax paid would be transferred to the appellant's account*. The complaint is thus unwarranted. (Emphasis added.)

[35] Turning to the facts of the present case, the respondent before us did not dispute that the initial assessment under the RPGTA 1976 was not discharged but went on to submit that the respondent had made necessary adjustments in consideration of the payment made by the appellant under the RPGTA 1976 and decided to raise the respective assessments under the provisions of the ITA 1967. According to the respondent, they are allowed to do so under the law.

[36] We disagree with the respondent. In our view, as the law stands, the correct procedure in this instance was for the respondent to have revised and discharged the assessment under the RPGTA 1976 and then raise the taxes under the ITA 1967.

[37] On this, we agree with Raus Sharif J (as he then was) in *MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2005] 7 MLJ 260, as follows:

> 14. I am of the view the same principle is applicable in Malaysia. *The respondent is not precluded from raising the assessment under ITA after reviewing the earlier assessment made under the RPGT*. To me, the respondent has the power to review or revise an assessment which include vacating an assessment on the ground that no real property gain tax is payable on the gains. *Thus, where an assessment for RPGT was made and subsequently it was discovered that there was no chargeable gain within the meaning of the RPGT and thus no real property gain tax is payable, the respondent can and must discharge the assessment …* (Emphasis added.)

[38] In the present case the respondent did not discharge the assessment under the RPGTA 1976. As such, we found that the respondent's action in raising the fresh assessment under the ITA 1967 was clearly illegal and ran contrary to the principle against double taxation.

[39] It follows that the learned JC had erred in failing to appreciate that the respondent had failed to act in accordance with the law or had arguably acted ultra vires.

[40] Based on the established principles of common law and Malaysian public law on administrative decision-making, the respondent's discretion to impose taxes is not absolute and unfettered. Unfettered discretion is, in principle, a contradiction in terms and cannot oust the revisionary powers of the courts in instances where the discretion is not exercised in accordance with the relevant law.

[41] In *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, the Federal Court held as follows:

> Applying the principles stated above, what is the effect of the condition under consideration? I read the affidavit of the Chairman, Land Executive Committee as claiming an unfettered discretion to grant or reject any application under s 124 or impose such conditions or other requirements as the Committee think fit. I cannot subscribe to this proposition for a moment Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite* (ante) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. *In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great*

> *powers and influence are exercised in accordance with law*. I would once again emphasise what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place', (per Danckwerts LJ in *Bradbury v London Borough of Enfield* [1967] 3 All ER 434 at p 442.)
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> The Land Executive Committee is a creature of statute, and therefore possesses only such power as may have been conferred on it by Parliament. *Therefore when a power vested in it is exceeded, any act done in excess of the power is invalid as being ultra vires.* If authority is needed for what may be considered as axiomatic, I need only refer to the cases of *Chertsey UDC v Mixnam's Properties, Ltd* [1964] 2 All ER 627 *and Hall & Co Ltd v Shoreham-by-Sea UDC* [1964] 1 WLR 240. In the former case, a statute required the occupier of land to obtain a licence before he used his land as a caravan site, and in granting such a licence the authority were empowered to impose such conditions 'as the authority may think necessary or desirable to impose', it was held that these conditions must be confined within the general purpose of the Act, and in so far as they exceeded this, they were void. In the latter case, Willmer LJ cited the well known judgment of Lord Greene MR in *Associated Provincial Picture Houses* (ante) which has several times been approved in the House of Lords, that it is in excess of power to 'come to a conclusion so unreasonable that no reasonable authority could ever have come to it', and he held that the condition to be 'utterly unreasonable and such as Parliament cannot possibly have intended'. (Emphasis added.)

[42] In our view, as the respondent had already issued the RPGTA 1976 assessment and certificate of clearance with respect to the land transactions, he should consequently be bound by the same. The respondent should not be allowed to act inconsistently, arbitrarily, or blow hot and cold.

[43] On this, we agree with Ibrahim J (as he then was) in *S Singaram v Fong Peck Moi & Anor* [1976] 1 MLJ 237 as follows:

> ... Furthermore I was of the view that defendant should not be permitted to blow hot and cold and have a second bite at the cake. In *Broom's Legal Maxims (*10th Ed) at p 103 it is stated that *'He is not to be heard who alleges things contrary to each other.'* As defendant had previously maintained that he was not out of time he could not now be heard to the contrary and ask for some other remedy ... (Emphasis added.)

[44] As in the instant case, the RPGTA 1976 assessment and certificate of clearance are final and conclusive under s 20 of the RPGTA 1976, which states that:

> Section 20 Finality of assessment.
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> (1) Where —
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> (a) no valid notice of appeal against an assessment has been given under section 18 within the time specified by that section (or any extension thereof);

(b) an agreement has been reached with respect to an assessment pursuant to subsection 101(2) of the Income Tax Act 1967;

(c) an assessment has been determined on appeal and there is no right of further appeal; or

(d) a valid notice of appeal against an assessment has been given but the appellant dies before the hearing of the appeal by the Special Commissioners is commenced or completed and no personal representatives of the estate of the deceased appellant applies to the Special Commissioners within two years after his death to proceed with or complete the hearing,

the assessment as made, agreed to or determined shall be final and conclusive for the purposes of this Act.

(2) Nothing in subsection (1) shall prejudice the exercise of any power conferred on the Director General by section 16 or 16A.

[45] Therefore, the principle of estoppel should apply against the respondent.

[46] In addition, the learned JC has also erred in law in holding that the SCIT is the proper forum under the provisions of the ITA 1967 to deal with the merits of this case yet, in the same breath, took a completely contradictory approach in her judgment by determining the merits of the respondent's claim.

[47] This conflicted with the learned JC's view that due to the existence of a domestic remedy, the appellant was precluded from pursuing the judicial review application as it was in the former that the appellant was entitled to ventilate the merits of its case fully. The effect was that the appellant was thus deprived of any right to appeal to the SCIT.

[48] In our judgment, the learned JC had erred in law and fact in arriving at her decision, which, in our considered opinion on account of the factual matrix of the instant case and the applicable principles of law, was clearly erroneous. Hence, this is a case that warranted appellate interference.

[49] In view of our agreement with the above contentions of the appellant, which we consider to be of substance, we do not propose to state our views on the other grounds of appeal for the purpose of this judgment.

CONCLUSION

[50] Having duly given due consideration for the rival contentions of the appellant and the respondent, respectively, and applying the law as it stands to the facts, we are inclined to uphold the appellant's contention that the learned

JC has arrived at the wrong conclusion that the present judicial review application has no merits and should be dismissed.

[51] It is our considered opinion that in law and on the peculiar facts before the High Court, the judicial review application had merits and should have been allowed as the respondent's decision, on the grounds raised by the appellant. Hence, this called for judicial intervention in the exercise of the High Court's supervisory jurisdiction and discretionary powers.

[52] By reason of those mentioned above, we conclude that there are sufficient merits in this appeal that called for our interference. We accordingly allow this appeal with cost and set aside the decision of the High Court. As a result, we make an order to allow the appellant's judicial review application against the respondent before the High Court as prayed for.

Appeal allowed, High Court's decision set aside and JR application allowed.

Reported by Ashok Kumar